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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

GOLDEN EAGLE WESTERN LINES, INC., a corporation,

vs, Appellee,

JOHN D. BINGAMAN, as Commissioner of Revenue of the State of New Mexico; JUAN N. VIGIL, as State Comptroller of the State of New Mexico; FRANK H. PATTON, as Attorney General of the State of New Mexico; JUANITA HILL, as State Gasoline Tax Collector of the State of New Mexico, and CLYDE TINGLEY, as Governor of the State of New Mexico,

Appellants.

No. 529

BRIEF OF APPELLEE

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Appellants.

No. 520

BRIEF OF APPELLEE

STATEMENT OF FACTS

Appellee accepts appellants' statement of facts, with the following supplemental statement:—

Plaintiff, appellee here, is a corporation organized under the laws of the State of Delaware and has never qualified to do business in the State of New Mexico.

STATEMENT OF THE CASE

From the allegations of the complaint, it appears that the State of New Mexico, acting through the officials named as defendants, demands, under authority of Chapter 176 of the New Mexico Session Laws of 1933, that the plaintiff

corporation become a licensed distributor, paying license fees and furnishing bond, and in addition thereto pay an excise tax on all gasoline used by the plaintiff corporation in operating its busses in interstate commerce through the State of New Mexico. The gasoline used by the plaintiff is purchased outside of the State of New Mexico, placed in the tanks of the busses outside of the State of New Mexico, and used to operate the busses over the highways of the State of New Mexico in interstate commerce solely.

The decree entered in the case by the Three-Judge Court (Tr. 41-43) enjoins the defendants, appellants here, from enforcing the provisions of Chapter 176 of the New Mexico Session Laws of 1933, so far as it relates to gasoline or other motor fuel purchased by the plaintiff outside of the State of New Mexico and used in its vehicles for the propelling of the same in interstate commerce within the State of New Mexico, and generally from enforcing said statute in any manner against the plaintiff or its predecessors in interest by reason of such use of gasoline or other motor fuel within the State of New Mexico.

In other words, while the majority opinion of the Court makes no direct reference to the threat made by officials of the State of New Mexico to require the plaintiff to take out a distributor's license, as required under Chapter 176 of the New Mexico Session Laws of 1933, this question is presented by the pleadings and was before the Three-Judge Court, and is included within the terms of the decree of injunction entered in this cause.

PROPOSITIONS OF LAW

The Attorney General, at Page 2 of his brief, in stating the propositions of law involved in this case, makes no mention of the attempt of the state to compel the plaintiff Golden Eagle Western Lines, Inc., a Delaware corporation, to take out a license as a distributor under the provisions of Chapter 176 of the New Mexico Session Laws of 1933. We submit that, in addition to the propositions of law set out at pages 2 and 3 of the Attorney General's brief, the following additional question must be passed upon in order to fully dispose of the case, namely:—

The State of New Mexico is without power to require the appellee corporation, engaged exclusively in interstate commerce to become a licensed distributor and to either—

1. file a certified copy of its articles of incorporation,
2. file a "statement" as to its capital stock,
3. file a "statement" as to the character of its business,
4. designate a principal office,
5. designate a resident agent upon whom process might be served,
6. pay fees, original or annual, for license to exercise corporate power,
7. be barred from rights to sue in state or other courts unless "licensed", or to
8. be subject to civil or criminal penalties for not being "licensed",

all as required under the provisions of Chapter 176, New Mexico Session Laws of 1933 (See Appendix "G"), and as threatened by the defendants.

MATERIAL STATUTORY AND CONSTITUTIONAL PROVISIONS

At pages 3 to 6 of the Attorney General's brief, appear excerpts from various statutes of New Mexico, which the Attorney General submits are material to the determination of the issues in this case.

Counsel for the appellee feel that a somewhat more extensive statement of the statutory provisions involved, including titles to several of the acts, is necessary to a thorough understanding of the situation, and as some of these acts are rather lengthy, we have included them in the appendix, identifying them as Appendix "A" to Appendix "J" inclusive.

Chapter 29, New Mexico Session Laws of 1929, referred to at page 3 of the Attorney General's brief, appears as Appendix "F".

Section 60-203, New Mexico Statutes Annotated, Compilation of 1929, referred to at pages 3 and 4 of the Attorney General's brief, appears as Appendix "D", Section "1".

Chapter 31 of the New Mexico Session Laws of 1931, referred to at page 4 of the Attorney General's brief, appears as Appendix "H".

Chapter 176 of the Session Laws of 1933, referred to at page 5 of the Attorney General's brief, appears as Appendix "G".

Section 60-205, New Mexico Statutes Annotated, Compilation of 1929, appears as Section 2 of Chapter 20, New Mexico Session Laws of 1927—Appendix "D".

In addition to these statutes and because of the fact that some of them are referred to in the dissenting opinion, we have included herein, as Appendix "A", Chapter 93 of the New Mexico Session Laws of 1919, which is the first gasoline tax act in effect in New Mexico, and the one construed by this Court in the cases of *"Askren v. Continental Oil Company,"* 252 U. S. 444, and *"Bowman v. Continental Oil Company,"* 256 U. S. 642. This act imposed the tax upon the *sale* or *use* of gasoline.

Appendix "B" is Chapter 175 of the Session Laws of 1921, which levied an excise tax merely on the *sale* of gasoline.

Appendix "C", Chapter 61 of the New Mexico Session Laws of 1925, imposed an excise tax on the *sale* of gasoline.

Appendix "D", Chapter 20, Session Laws of 1927, imposes an excise tax on the *sale* of gasoline, and provides for the use of the proceeds of the tax.

Appendix "E", Chapter 14, Session Laws of 1927, imposes an excise tax on the *use* of gasoline, with provision for the allowance of credit where the tax had already been paid upon the sale of gasoline.

Appendix "F", Chapter 29 of the Session Laws of 1929, amends the provisions of Chapter 14, Session Laws of 1927, Appendix "E".

Appendix "I", Chapter 129 of the Session Laws of 1929, sets forth the pertinent portions of the act, providing for the regulation of motor vehicles operated as common carriers on the highways of the State of New Mexico.

Appendix "J", Chapter 154, New Mexico Session Laws of 1933, sets forth the pertinent provisions of the 1933 act for the supervision and regulation of the business of

transportation by motor vehicle for hire over the public highways of the State of New Mexico.

In addition to these provisions of the statute, we deem the following Constitutional provisions pertinent:—

ARTICLE IV—NEW MEXICO CONSTITUTION

> Sec. 16. The subject of every bill shall be clearly expressed in its title, and no bill embracing more than one subject shall be passed except general appropriation bills and bills for the codification or revision of the laws; but if any subject is embraced in any act which is not expressed in its title, only so much of the act as is not expressed shall be void. * * * * *
>
> Sec. 18. No law shall be revised or amended, or the provisions thereof extended by reference to its title only; but each section thereof as revised, amended or extended shall be set out in full.

Beginning at an early date, the state of New Mexico also required annual registration fees for motor vehicles using the public highways within the state, these fees being credited to the state, county and municipal road funds.

INTRODUCTORY ARGUMENT

Before entering into consideration of the four points made in the brief of the Attorney General, the appellee desires to state its position in the light of Federal decisions.

The appellee contends that the gasoline use tax cannot be construed as a statute exacting compensation for use of the state highways for the following reasons:—

1. The excise tax in issue is *not* a toll or rental, nor is it any other form of direct charge for use of state facilities. Cases illustrative of this distinction are:—

Parkersburg Transp. Co. vs. Parkersburg, 107 U. S. 691

Huse vs. Glover, 119 U. S. 543, 548

Monongahela Nav. Co. vs. United States, 148 U. S. 312

St. Louis vs. Western Union Tel. Co. 148 U. S. 92, 97-101
Postal Tel-Cable Co. vs. Baltimore. 156 U. S. 210
Carley & Hamilton vs. Snook, 281 U. S. 66
Nashville C & St. L. Ry vs. Wallace, 288 U. S. 249.

The rule announced in the case of *Helson and Randolph vs. Kentucky,* 279 U. S. 245 applies so that gasoline purchased and placed in the tanks of plaintiff's vehicles outside of the state of New Mexico may not have the excise tax applied to the proportion thereof used in the State of New Mexico, regardless of whether such tax is intended as compensation for use of state highways.

Plaintiff contends that such excise tax is levied on the use of facilities in interstate commerce and is unconstitutional under the commerce clause regardless of the purposes to which the tax money is devoted.

A state charge against a carrier in interstate commerce has been justified under some conditions by way of *tolls* or *rentals,* and as such, are said to not unduly burden interstate commerce. Such taxes or fees are direct charges exacted for compensation for use of state facilities. Such charges are subject to test as to reasonableness of amount for the direct purpose specified. Such *direct* charges are sometimes said to be an *indirect* burden on interstate commerce. Cases of this character are as follows:—

A city constructed a wharf and charged fees applicable to intrastate and interstate carriers for the use thereof. In distinguishing *Cannon vs. New Orleans,* 20 Wall 577, which held a tax statute unconstitutional, the court indicated the basis of its decision sustaining the constitutionality of "wharfage fees". It was said:

> "The one (tonnage duty) is imposed by the government, the other (wharfage fees) by the owner of the wharf or landing. The one is a commercial regulation, dictated by the general policy of the country upon consideration having reference to its commerce or revenue (hence invalid); the other is a *rent* charged by the owner of the property for its temporary use."

(underscoring ours) *Parkersburg Transportation Co. vs. Parkersburg,* 107 U. S. 691.

See also as to canal lock tolls it was said:

> "The exaction of tolls for passage through the locks is as compensation for the use of artificial facilities constructed, not as an impost upon the navigation of the stream. . . . . For outlays caused by such works (improving navigability) the state may exact reasonable charges for the use of warves and locks constructed to facilitate the landing of persons and freight, and the taking them on board, or for the repair of vessels." See *Huse vs. Glover,* 119 U. S. 543, 548.

To the same effect, and quoting the above from the Huse case with approval see *Monongahela Navigation Co. vs. United States,* 148 U. S. 312.

In the case involving a municipal charge against a telegraph company erecting poles therein it was held that such charge was not a privilege or license tax. The court said:

> "It is more in the nature of a charge for the use of property belonging to the city—that which may be properly called rental. 'A tax is a demand of sovereignty; a toll is a demand of proprietorship'." See *St. Louis vs. Western Union Tel Co.,* 148 U. S. 92, 97-101.

See also to same effect, *State Freight Tax Case,* 15 Wall, 232, 278.

The Supreme Court explained its reasons for sustaining the constitutionality of an ordinance in the following words:

> "The use which the defendant makes of the streets is an exclusive and permanent one, and not one temporary, shifting and in common with the general public. The ordinary traveler, whether on foot or in vehicle, passes to and fro along the streets and his use and occupation thereof are temporary and shifting. The

space he occupies one moment he abandons the next to be occupied by another traveler. This use is common to all members of the public, and it is open equally to citizens of other states with those of a state in which the street is situate. But the use made by the telegraph company in respect to so much of the space as it occupies with its poles, is permanent and exclusive. . . . . All that we desire or need to notice is the fact that this case is an absolute permanent and exclusive appropriation of that space in the streets which is occupied by telegraph poles. To that extent it is a use different in kind and extent from that enjoyed by the general public. . . . . When an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or a corporation of the same or another state, or a corporation of the National Government, it is within the competency of the state, representing the sovereignty of that local public, to exact for its benefit compensation for this *exclusive appropriation.* It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the state may if it chooses exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated." (underlining ours) See *St. Louis vs. Western Union Tel Co.* 148 U. S. 92. 97-101.

An almost identical decision to that last above quoted from is found in *Postal Tel-Cable Co. vs. Baltimore,* 156 U. S. 210.

But a gasoline tax is not a toll for the use of the highways. This was specifically decided in *Carley & Hamilton vs. Snook,* 281 U. S. 66, and *Nashville C & St. L. Ry vs. Wallace,* 288 U. S. 249. In the last cited case the railroad company used the gasoline exclusively for the operation of equipment on its own right of way and complained that the tax was levied as a charge for the use of the highways (which it did not use), this being the same contention that is now made by the State of New Mexico in the instant case.

But the court said: "But the levy is a tax, not a toll or charge for use of the highways."

The Attorney General lays much stress on decisions holding that states may levy a tax on instrumentalities of interstate commerce as compensation for the use of state facilities, citing the case of Interstate Transit, Inc. v. Lindsey, 283 U. S. 183, and the several cases referred to on page 10 of his brief.

It is our contention that a careful analysis of these cases, which we have cited, discloses that such statutes, to be constitutional in the face of the commerce clause, must be by way of the exaction of a toll or a charge that is compensation directly to the state, and that expressions in some of the cases which are apparently in conflict with this proposition, must be considered as "dicta". When these cases are analyzed we think it clear that a tax statute to be applicable to instrumentalities of interstate commerce must clearly be by its terms one that does not tax for general purposes, but taxes for the specific purpose of securing compensation for the use of state facilities involved in the tax statute itself. As stated before, such a "tax" is not properly an "excise tax", but is a charge or rental for the use of the state properties or facilities.

2. The excise tax in issue is *not* exacted pursuant to an exercise of the police power in the interest of the health, safety, morals and welfare of the citizens of the State, nor is it for police regulation or defraying of costs concerning the same. The statute is not regulatory in nature. It is purely a revenue measure. Cases illustrative of this distinction are:

Clark vs. Poor, 275 U. S. 554
Minnesota Rate cases, 230 U. S. 352, 401
Hendrick vs. Maryland, 235 U. S. 610
Kane vs. New Jersey, 242 U. S. 160
Hess vs. Pawloski, 274 U. S. 352
Morris vs. Duby, 274 U. S. 135
Interstate Busses Corp. vs. Blodgett, 276 U. S. 245
Helson & Randolph vs. Kentucky, 279 U. S. 245
Sprout vs. City of South Bend, 277 U. S. 163

3. The excise tax as here levied is a privilege or occupation tax and is levied on the *use* of a facility in interstate commerce, and is, therefore, void under the commerce clause.

Helson & Randolph vs. Kentucky, 279 U. S. 245
Breece Lumber Co. vs. Mirabal, 34 N. Mex. 643, 287 Pac. 699, Affirmed 283 U. S. 688
Transcontinental & Western Air, Inc. v. Lujan, 36 N. Mex. 64, 8 Pac. (2nd) 103
Mid-Continent Air Express Corp. vs. Lujan, 47 F (2nd) 266
Bowman vs. Continental Oil Co., 256 U. S. 242
In Re Wilson, 10 N. Mex. 32; 60 Pac. 73; 48 L. R. A. 417
Monamotor Oil Co. vs. Johnson, 292 U. S. 86; 93-95
Eastern Air Transport vs. Tax Commission, 285 U. S. 147, 153
Central Transfer Co. vs. Commercial Oil Co. 45 F (2nd) 400, 402
American Airways vs. Wallace, 57 F (2nd) 877, 880
Western Air Transport vs. South Carolina Tax Commission, 52 F (2nd) 456, 459
Gloucester Ferry Co. vs. Pennsylvania, 279 U. S. 245
Leloup vs. Port of Mobile, 117 U. S. 640
Adams Express Co. vs. Ohio, 166 U. S. 185-218
United Airways vs. Shaw, 43 F (2nd) 148
Boeing Air Transport v. Edleman, 289 U. S. 249
Cooney vs. Mountain States Tel & Tel Co. 294 U. S. 384; 55 Sup. Ct. Rep. 477

4. Such an excise tax levied on the use of a facility in interstate commerce is void, regardless of the purpose for which it is enacted or the application made or to be made of the funds to be derived therefrom; nor does the constitutionality thereof depend upon enjoyment by the tax payer of any special benefit from said funds. Hence even though said statute could be considered one exacting compensation for use of state facilities, it is nevertheless unconstitutional under the commerce clause.

Western Union Tel Co. v. Kansas, 216 U. S. 1, 19-24
Cobb vs. Dept. of Public Works, 60 F. (2nd) 631, 640
Crutcher vs. Kentucky, 141 U. S. 47
Breece Lumber Co. vs. Mirabal, 34 N. Mex. 643, 287 Pac. 699, affirmed 283 U. S. 788
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In re Opinion of the Judges, (S. Dak.) 210 N. W. 186
Clark vs. Poor, 275 U. S. 554
Bowman vs. Continental Oil Co., 256 U. S. 642
Boeing Air Transport vs. Edleman, 61 F (2nd) 319, 423 (reversing id. 51 F (2nd) 130
Helson & Randolph vs. Kentucky, 279 U. S. 245
Varney Air Lines vs. Babcock (D. C.) 1 Fed. Supp. 687

5. The legislative history of the statutes in question and the interpretations thereof by the highest courts of the State of New Mexico, and by the Federal Courts, conclusively prevent any presumption or assumption that the gasoline excise tax statute was enacted for the purpose of securing compensation unto the state for the use of its highways. Nor does the enactment of the refund statute serve in any manner to change the situation.

Askren v. Continental Oil Co. 252 U. S. 444.
Bowman vs. Continental Oil Co., 256 U. S. 642
Breece Lumber Co. vs. Mirabal, 34 N. Mex. 643, 287 Pac. 699
Transcontinental & Western Air vs. Lujan, 36 N. Mex. 64, 74, 8 Pac. (2nd) 103
Mid-Continent Air Express Corp. vs. Lujan, 47 Fed (2nd) 266

APPELLEE'S REPLY TO APPELLANTS' POINT I

As we read appellants' brief, counsel admit under Points I and II that the New Mexico acts levying and im-

posing the excise tax of five cents per gallon upon the use of all gasoline used within the state for any purpose, except gasoline sold in interstate commerce, should be construed as excise taxes upon the use of such gasoline and not as compensation for the use of the public highways, were it not for the provisions of Chapter 31, 1931 Session Laws of New Mexico, and the amendments thereto. This most certainly was the holding of the Supreme Court of New Mexico in the cases of *"Breece Lumber Co. v. Mirabal,"* 34 N. M. 643, 287 P. 699, and *"Transcontinental and Western Air, Inc. vs. Lujan,"* 36 N. M. 64; 8 P. (2nd) 103. It is also the construction placed by this court upon the earlier act, Chapter 93, New Mexico Session Laws of 1919 (which act does not differ in effect from the later acts here involved).

Askren vs. Continental Oil Co., 252 U. S. 444
Bowman vs. Continental Oil Co., 256 U. S. 642.

At pages 8 and 9 of appellants' brief appears a reference to the stipulation entered into by counsel (Paragraph XII, page 32 Tr.).

It will be noted that the stipulation is merely to the effect that the taxes collected under the two laws in question are distributed and used by the State of New Mexico in accordance with the provisions of Section 60-205 of the New Mexico Statutes Annotated, Compilation of 1929.

As a matter of fact the taxes are so distributed and used notwithstanding the fact that Section 60-205 of the New Mexico Statutes Annotated, Compilation of 1929 (page 9 appellants' brief and Appendix "D", Sec. 2), does not in fact govern the distribution and use by the State of New Mexico of any taxes collected by the state under the *use* tax, as the section in question (Appendix "D", sec. 2 which is amendatory of Chapter 175, New Mexico Session Laws of 1921, Appendix "B") only provides for the distribution and use of the proceeds of the *sales* tax as distinguished from the *use tax*. At the time of the passage of Chapter 175, New Mexico Session Laws of 1921 (Appendix "B") and of Chapter 61, New Mexico Session Laws of 1925 (Appendix "D") (notwithstanding the fact that on the same

date there was approved an independent act imposing a use tax, Chapter 14, Session Laws of 1927) there was no such thing as a use tax in the State of New Mexico, and since that date no new act has been passed disposing of the proceeds either of the sales tax or the use tax. Chapter 176, Session Laws of 1933 (Appendix "G") Section 13, provides:—

> "The excise tax of five cents (5c) per gallon on motor fuel and gasoline as herein levied and provided for (this includes both the sales and use tax levied by the provisions of this act) shall be distributed as now or hereafter provided by law."

It follows from the foregoing that during all of the times material to this discussion, there has been upon the statute books of New Mexico no statute allocating the proceeds of the *use tax* to highway purposes. Paragraph XII of the stipulation of facts merely stipulates that the proceeds of the use tax have been as a matter of practice, by the administrative officers of the state, allocated to highway purposes and so used by the state. It follows as a matter of law, therefore, that the proceeds of the gasoline use tax, under the statutes, are not, *by virtue of any statute,* allocated to the construction or maintenance of the public highways of the State of New Mexico, and, *in the absence of any controlling statute,* properly become part of the general revenues of the state.

We have felt it necessary to call attention to this situation because of the insistence of counsel for the appellant that the allocation to highway purposes of these funds is one of the controlling factors in determining the type and character of the use tax and in construing the same, and particularly because of counsel's reference (Page 9 appellant's brief) to the case of *"Interstate Transit, Inc. v. Lindsey,* 283 U. S. 183.

It follows from the foregoing that the argument of the Attorney General based upon the allocation and use of the funds fails, unless the argument can be re-stated as follows:—

"Because the administrative officials of the State of

New Mexico have, as a matter of practice, allocated the use tax to highway purposes, and used it for such purposes, therefore, it follows that the use tax must be construed as a toll, charge or tax imposed upon appellant as compensation for use of the state highways." This goes beyond any rule announced by this Court or any other Court.

Even when we refer to the sales tax and the distribution of the same, it is payable not entirely for highway purposes but payable on bond and debenture obligations.

Sec. 2, Chapter 20, Session Laws of 1927, (Appendix "D")
Breece Lumber Co. vs. Mirabal, 34 N. M. 643, 287 P, 699 (affirmed 283 U. S. 788).

In addition to citing the case of *Interstate Transit, Inc. v. Lindsey,* supra, counsel for the appellants cited the cases of

Clark v. Poor, 274 U. S. 554
Hendrick v. Maryland, 235 U. S. 610
Interstate Busses Corp. v. Blodgett, 276 U. S. 245
Kane v. New Jersey, 242 U. S. 159

to the proposition that a "state may impose, even upon motor vehicles engaged exclusively in interstate commerce, a charge or compensation for the use of the public highways" (appellant's brief, p. 10).

The cases of *Hendrick v. Maryland,* supra, and *Kane v. New Jersey,* supra, involve the ordinary form of motor vehicle registration fees and licenses, the statutes in both cases specifically providing that such fees and licenses are exacted for the right or privilege to use the public highways.

The case of *Interstate Transit, Inc. v. Lindsey,* supra, involved a graduated privilege tax of the state of Ohio for the specific privilege of operating certain types of motor vehicles over the public highways.

Clark v. Poor, cited supra, involved the Ohio transportation act of 1923, which generally required motor common carriers for hire to apply to the Public Utilities Commis-

sion for a certificate so to do and to pay a specific tax for the privilege of so operating over the highways.

The case of *Interstate Busses v. Blodgett,* cited supra, involved a statute of Connecticut imposing a tax of one cent a mile "as an excise on the use of such highways."

It will be noted that in all of these cases it is specifically declared in the act in question that the exaction of the tax is either for the right to operate motor vehicles upon the public highways or as compensation for the use of the highways.

The earliest case appears to be the case of *Hendrick v. Maryland,* cited supra. Under our preliminary argument we have discussed and considered the cases cited by this Court in support of the rule announced in the case of *Hendrick v. Maryland,* and it will be seen that all cases so cited in *Hendrick v. Maryland* are what might be termed "toll" or "rent" cases.

Having cited the cases referred to supra, counsel for appellant then propounds the following query (p. 10 of appellants' brief):

> "Why may it (the state) not impose a similar charge upon gasoline used exclusively in interstate commerce?"

At page 14 of appellants' brief, counsel states:

> "We do not find a case in which this court has passed upon the validity of a gasoline tax as applying under conditions the same as those existing in the present case. However, we do find decisions of other courts upon state gasoline tax statutes which reflect views the same or similar to those we have expressed."

Counsel then cites the case of *Varney Air Lines v. Babcock,* 1 Fed. Sup. 687, and contends that the reasoning and principle invoked in that case is applicable to the case at bar.

Counsel for the appellee have made an exhaustive search to find any cases involving a gasoline use tax, supporting the tax as against one engaged in interstate commerce upon the "compensation" theory. The only cases

we have been able to find are *Boeing Air Transport v. Edleman,* 51 Fed. (2nd) 130, in which the judge of the district court expressed this theory, relying upon the Hendrick case, cited supra, and cases cited therein, none of which support, as we have heretofore shown, the contention that state compensation may be exacted from an interstate carrier *through an excise tax on the use of interstate facilities.* On appeal to the Circuit Court of Appeals, 61 Fed. (2nd) 319, the state compensation theory was entirely disregarded and, in effect, overruled, the Circuit Court of Appeals holding:

> "In so far as the Court denied the writ prayed for, the case will be remanded with directions to issue the writ enjoining collection of the tax on all gasoline procured by appellant on purchases completed outside the State of Wyoming and then brought into that State and used in its planes in interstate commerce." See *Boeing Air Transport v. Edleman,* 61 F. (2nd) 319, 324.

When the case reached this Court there was no occasion to refer to the "use of state facilities" argument as the whole issue was by the amended complaint confined to the application of the tax to gasoline "which respondent withdraws from storage" in the State. See *Boeing Air Transport v. Edleman,* 289 U. S. 249.

The only other case we are aware of in the Federal Courts on this point is *Varney Air Lines vs. Babcock* (D.C.) 1 F. Sup. 687. It follows the same line of reasoning and relies on the same authorities as the District Court did in the Boeing case, which was reversed by the Circuit Court.

Counsel for appellant also cites, as sustaining this theory, the case of *State v. Johnson* (La.) 138 South. 503. In that case the legislature passed an act levying a tax of four cents a gallon on all gasoline and motor fuel sold, used or consumed in the State of Louisiana for domestic consumption. The gasoline in controversy was imported by the common carrier and was stored in its tanks and was thereafter used. The Court held that the tax so imposed and collected on the gasoline taken from storage and used did not constitute an unconstitutional burden on interstate

commerce, and in arriving at its conclusion used the language quoted on page 15 of appellants' brief.

This brings us to a consideration of the case of *Helson v. Kentucky*, 279 U. S. 245. It is the contention of counsel for appellee that the rule announced in this case is the applicable rule in the case at bar. This case has been referred to and construed in the following cases:

Mid-Continent Air Express Corp. v. Lujan, 47 Fed. (2nd) 266
United Airways v. Shaw, 43 Fed. (2nd) 148, 150
Eastern Air Transport v. Tax Commission, 285 U. S. 147 at p. 153
Edleman v. Boeing Air Transport, 289 U. S. 249
Central Transfer Co. v. Commercial Oil Co., 45 Fed. (2nd) 400, at p. 402.
Western Air Transport v. South Carolina Tax Commission, 52 Fed (2nd) 456, at p. 459
American Airways v. Wallace, 57 Fed. (2nd) 877 at p. 881

As we read the foregoing cases and the distinctions made in these cases between the facts in the particular case and the Helson case, we find nothing which limits the ultimate and final holding in the Helson case, viz: (Quoting from the Helson case)

> "While a state has power to tax property having a situs within its limits, whether employed in interstate commerce or not, it cannot interfere with interstate commerce through the imposition of a tax which is, in effect, a tax for the privilege of transacting such commerce."

Helson v. Kentucky, cited supra.

This brings us to a consideration of the two New Mexico cases, *Breece Lumber Co. v. Mirabal*, 34 N. M. 643, 287 P. 699, and *Transcontinental & Western Air, Inc. v. Lujan*, 36 N. M. 64, 8 P. (2nd) 103.

As heretofore stated in this brief, the original gasoline

tax act in New Mexico, Chapter 93, Session Laws of 1919 (Appendix "A") was construed by this Court. This Court there held that the use tax feature of the act was an excise tax upon the privilege of using gasoline within the State of New Mexico. There being no difference between the two acts, we feel that this construction is controlling in the case at bar.

In the *Breece Lumber Co.* case, cited supra, the Supreme Court of New Mexico was called upon to construe the provisions of Section 1, Chapter 14 of the Session Laws of 1927 (Appendix "E") as amended by Section 1 of Chapter 29 of the Session Laws of 1929 (Appendix "F"). In that case the contention was made, on the one hand, that the tax was a property tax. Upon this question, the Court held that the tax was an excise tax, citing the case of *Bowman v. Continental Oil Co.*, supra, and other cases. The second contention made by counsel in that case was that it was a special privilege tax upon users of the public roads of the State. In considering this question, the Court said:

> "Much effort is made in the argument and brief of counsel for appellees to convince us that this is a special privilege tax upon users of the public roads of the state by means of automobiles in traveling upon such highways. If we understand the argument it is as follows: The tax is a tax upon the use of public highways by gasoline propelled vehicles; appellees do not use the public highways in the consumption of gasoline in their operations; therefore they cannot legally be charged with the tax. If both of appellees premises were true their conclusion would inevitably follow. The trouble is with the major premise. In the first place, as we have heretofore assumed, the tax is not laid on the use of public highways, and it is likewise true that the entire proceeds of the tax are devoted, by statute, to the payment of such bonds and debentures as may have been issued by the state to secure a fund with which to build and improve the highways of the state. But this has nothing to do with the matter. *This is merely a financial arrangement of the state to make sure provision for the prompt payment of its obliga-*

tions when they become due. The gasoline tax is known to be a large revenue producer, and the *state has simply set it aside to pay principal and interest on its obligations on which it has borrowed money.* The obligation to apply the gasoline tax does not in any way discharge the state from its obligation to pay its debts out of any available revenues. It seems clear, therefore, that this tax is a simple excise tax and is in no sense a special privilege or benefit tax, as appellees argue." (Underlining ours) *Breece Lumber Co. v. Mirabal,* 34 N. M. 643, 287 Pac. 699. (Affirmed 283 U. S. 788).

In the *Transcontinental and Western Air* case, cited supra, the Supreme Court of New Mexico said:

"It is one thing to tax appellee for using, as an instrumentality in interstate commerce, its own property, upon which perchance it has already paid lawful excises imposed by other states. It is quite a different thing, we think, to tax the business of selling gasoline, which by force of circumstances only, adds to the expense of appellee's interstate business."

"Since this suit was instituted the legislature has made provision for refunds to purchasers of gasoline for use otherwise than in motor vehicles operated on the highways. Laws 1931 C. 31. Appellee suggests that this may well be considered as a legislative construction of 1929 Comp. sec. 60-203, and as evincing legislative intent to exempt gasoline sold for aircraft use. The history of gasoline tax legislation in this state will not warrant such construction." See *Transcontinental & Western Air, Inc. v. Lujan,* 36 N. M. 64, 74, 8 Pac. (2nd) 103.

Counsel for appellee, under Point IV, takes the position that, notwithstanding the definite and specific determination of the character of the tax by the Supreme Court of New Mexico, such interpretation and construction of the act by the Supreme Court of New Mexico is not binding upon the Supreme Court of the United States. We will discuss this at a later point in the brief.

It is sufficient to state at this point that we take the position that the construction of the particular acts in question, both by this Court and by the Supreme Court of the State of New Mexico, *definitely establish the character of the tax as an excise tax upon the use of gasoline,* regardless of where or how it is used, and that in the face of these decisions, two by this Court, and two by the Supreme Court of New Mexico, it cannot now be said that the tax imposed by the several acts referred to herein can be construed or held to be a toll, charge or compensation exacted by the State of New Mexico for the use of the public highways. Even if we should admit, for the sake of argument, that the statute is now open to construction by this Court, we take it that this Court in so construing the act will be bound to construe it in the light of the constitutional provisions of the State of New Mexico, and in particular, in the light of Sections 16 and 18 of Article IV of the New Mexico State Constitution (quoted supra under the heading of "Material Statutory and Constitutional Provisions" at page 5 of this brief).

Section 16 of Article IV of the New Mexico Constitution provides:

> "The subject of every bill shall be clearly expressed it its title * * * * but if any such is embraced in any act which is not expressed in its title, only so much of the act as is not expressed shall be void."

We take it that the Supreme Court of New Mexico in the *Breece Lumber Company* case had this provision of the constitution in mind when the court said "It seems clear, therefore, that this tax is a simple excise tax and is in no sense a special privilege or benefit tax, as appellees argue." And again when they said "In the first place, as we have heretofore assumed, the tax is not laid on the use of the public highways." And again, when the Supreme Court of New Mexico, in the *Transcontinental and Western Air* case used the language quoted above. Section 16 of Article IV of the New Mexico Constitution has been construed by the New Mexico Supreme Court in the following cases:

State v. Ingalls, 18 N. M. 211, 135 Pac. 1177
State v. Saint, 28 N. M. 165, 219 Pac. 573
Davey v. McNeill, 31 N. M. 7, 240 Pac. 482
State v. Armstrong, 31 N. M. 220, 243 Pac. 333
State v. Miller, 33 N. M. 200, 263 Pac. 510
State ex rel Taylor v. Mirabal, 33 N. M. 540, 273 Pac. 928

In the case of *State v. Ingalls,* cited supra, the court lays down the rule as follows:

> "The true test of the validity of the statute, alleged to contain two subjects, one of which is not clearly expressed in the title, in conformity with Section 16 of Article IV of the Constitution, is whether the title fairly gives reasonable notice of the subject matter of the statute itself."

In the case of *State v. Saint,* cited supra, the title of the act in question was "An Act creating the County of Harding and providing for the issuance, sale, transfer and assignment of establishment bonds in aid thereof." Under this title Section 19 of the act attempted to provide for the establishment of a county high school and to levy taxes for the support of the same and to provide for the issuance of debentures in anticipation of tax collections. The Court held that Section 19 was school legislation and not within the title to the act creating Harding County.

An examination of the several taxing statutes cited in the Appendix, from Appendix A to and including Appendix G, fails to disclose any intent on the part of the legislature to levy the use tax or the sales tax as a toll, charge or compensation for the use of the public highways. On the other hand, when we refer to the provisions of Chapter 129 of the Session Laws of 1929, and Chapter 154 of the Session Laws of 1933, Appendix I and Appendix J, which are the acts providing for the supervision and regulation of the business of transporting persons and merchandise over the public highways for hire, we find a specific provision in the title, in each instance, to the effect that the taxes and fees provided in such acts are for compensation to be paid

for the use of the public highways of the State of New Mexico, and in the second act for the carrying on of business upon the public highways. It will be noted that these acts were in force at all times material to the issues involved in the case at bar. We recognize the well known principle of law, which has been announced many times by this Court, that a state is not limited to any one particular form of taxation; that it may impose two different taxes for the exercise of a particular right or privilege, but in the instant case we have two statutes specifically providing that the taxes and fees are exacted as compensation for the use of the public highways, while the statutes here in question do not in any manner or form indicate that the tax upon the use of gasoline is assessed under the compensation theory.

Under Point I counsel for appellants present the contention that when the use tax acts are considered in conjunction with Chapter 31 of the 1931 Sessions Laws of New Mexico (Appendix H) and the amendments thereto, the gasoline use tax acts constitute merely a compensatory and regulatory exaction for the use of the public highways of the State of New Mexico. We will discuss this feature under the next heading in this brief.

APPELLEE'S ARGUMENT IN RESPONSE TO APPELLANTS' POINT II

Under Point II counsel for appellants advance the proposition that the Supreme Court of New Mexico has not construed the use tax acts in conjunction with Chapter 31 of the Session Laws of 1931 (Appendix H). Therefore the determination of the character of the act is still an open question for this Court.

Before entering into a discussion of this question we desire to call the Court's attention to the language of Chapter 31 of the Session Laws of 1931.

First, the title to the act, so far as is material here, is "An Act to provide for refunding the excise taxes paid on gasoline or motor fuel purchased and used by consumers other than in motor vehicles operated or intended to be operated on any public streets or highways of the State of New Mexico." It will be noted that the title permits

the refund of excise taxes only on motor fuel purchased and used by the consumer. Under Section 1 of the act the refund can be obtained only where the purchaser has paid the excise tax to a *distributor or wholesaler* upon fifty-six gallons or more of gasoline or motor fuel. Under Section 2 of the act purchasers desiring to take advantage of the refund provisions must, at the time of purchase and payment of the tax, obtain a receipt. Under Section 3 of the act, after payment of the tax, and upon submitting the receipts to the State Comptroller and making an affidavit, the purchaser may obtain a refund. Under Sections 5 and 6 of the act the wholesale dealers and distributors are required to keep certain records, and a penalty is imposed for violation of the provisions of the act. Under Sections 7 and 8 of the act the penalties under the act are dealt with.

The 1933 amendments do not change the general purport of the 1931 act.

It appears from an examination of the act that the refunds provided *can only be obtained under the sales tax provisions of the gasoline tax act.* In other words, no refund can be had except in cases where the purchaser buys his gasoline from a *licensed wholesaler or distributor within the State of New Mexico.* A user of gasoline buying his gasoline from outside the state and using it within the state, regardless of the use to which the gasoline is put, cannot obtain a refund of the use tax paid on the gasoline so purchased outside of the State of New Mexico, notwithstanding the fact that he uses such gasoline other than in motor vehicles upon the public highways. We have called attention to this situation for the purpose of showing that the refund act of 1931 is, in effect and in fact, applicable only under the sales tax provisions of the gasoline tax act, and does not apply to the use tax provisions of the act. This brings us to a consideration of the effect of the refund act upon the gasoline tax acts in question in this suit.

In the first place, Chapter 31 of the Session Laws of 1931, and its amendatory act, are not exemption statutes. They are limited refund acts applicable only to the sales tax feature of the gasoline tax acts.

Can it then be said that this refunding act changes the type and character of the original gasoline excise tax acts?

Section 18 of Article IV of the New Mexico Constitution provides:

> "No law shall be revised or amended, or the provisions therof extended by reference to its title only, but each section thereof as revised, amended or extended shall be set out in full.

This provision of our constitution has been construed in the following cases:

Davey v. McNeill, 31 N. M. 7, 240 Pac. 482
State v. Armstrong, 31 N. M. 220, 243 Pac. 333

In the case of *State v. Armstrong,* supra, the Supreme Court of New Mexico was considering "An Act to enforce the provisions of Article 18 of the amendments to the Constitution of the United States prohibiting all acts or omissions prohibited by the national prohibition acts, etc." On re-hearing the Court held that the provisions of Sections 1 and 2 of the act, attempting to adopt by reference the penal provisions of the national prohibition act as the law of New Mexico, violated Section 18 of Article IV of the New Mexico Constitution, in that these sections attempted to extend the provisions of that act by reference to its title only and make them a part of the body of the law in New Mexico without setting the same out in full.

In the face of this decision of the New Mexico Supreme Court we fail to see how Chapter 31 of the Session Laws of 1931, the refunding act, can be construed to revise, amend or extend the provisions of the gasoline tax acts in question in this suit.

At page 17 of appellants' brief the Attorney General quotes from the case of *Transcontinental and Western Air, Inc. v. Lujan,* cited supra. Standing alone this quotation is, as we construe it, hardly a fair statement, and we quote the paragraph as follows:

> "The use tax comes to this: For the privilege of traversing New Mexico in the air, of landing on our soil, and of transporting mail and passengers into and

out of our state, we exact a price measured by the quantity of gasoline consumed. This seems to transgress the rule formulated in *Atlantic & Pacific Telegraph Co. v. Philadelphia,* 190 U. S. 160, 23 S. Ct. 817, 818, 47 L. Ed. 995: 'No state can compel a party, individual, or corporation to pay for the privilege of engaging in interstate commerce.' See, also, *Crutcher v. Kentucky,* 141 U. S. 47, 11 S. Ct. 851, 35 L. Ed. 649. *Barrett v. New York,* 232 U. S. 14, 34 S. Ct. 203, 58 L. Ed. 483. So considering the effect of the Kentucky tax, the Supreme Court condemned it saying: 'The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce.' *Helson v. Kentucky,* supra."

Quoting further from the same case on re-hearing:

"We are strongly impressed that the use tax is distinguishable from the sales tax, not only in form, but in operation and effect. The obvious purpose of the use tax in this state is to supplement the sales tax, rendering it impossible legally to avoid the latter by purchasing out of the state for use in the state. Users of gasoline are required to report and pay the tax only on such gasoline as was not purchased from a licensed dealer. 1929 Comp. Par. 60-102. It is one thing to tax appellee for using, as an instrumentality of interstate commerce, its own property, upon which perchance it has already paid lawful excises imposed by other states. It is quite a different thing, we think, to tax the business of selling gasoline, which, by force of circumstances only, adds to the expense of appellee's interstate business."

Following the quotation, at page 17, the Attorney General suggests that the learned Justice who wrote the opinion in the *Transcontinental and Western Air* case might have paraphrased the language, if he had been writing the opinion in the case at bar, as follows:

"For the privilege of traversing New Mexico over

the public highways and of using the highways of this state, owned and maintained at great expense by the state and specially built to withstand the tremendous wear and tear caused by large and heavy motor busses used in interstate commerce, we exact a price measured by the quantity of gasoline consumed."

The fallacy of the argument is that nowhere in the gasoline tax acts is there any intimation or suggestion, either in the title to the act or in the body of the act, that such was the legislative intent.

At page 18 of appellants' brief, the Attorney General quotes from the case of *Clyde Mallory Lines v. Alabama*, decided by this Court on December 9, 1935. The Attorney General apparently argues that the words italicized "levy of a tax," indicate that any kind of a tax can be levied upon interstate commerce, ignoring the qualification "which represents a reasonable charge upon interstate automobile traffic passing over state highways." The cases cited by this Court to the quoted language have been heretofore discussed in our brief.

APPELLEE'S REPLY TO APPELLANTS' POINT III.

Under Point III the Attorney General takes the position that even if Chapter 176 is construed to be an excise tax upon the use of gasoline, it can still be justified as a compensatory or regulatory exaction for the use of state facilities.

The Attorney General attempts to distinguish the Helson case, and submits that the rule announced in that case is not applicable and should be qualified by this Court because in the Helson case there was no state facility involved while in the case at bar the appellee uses the New Mexico state highways, citing the two cases of *Hendrick v. Maryland* and *Interstate Transit v. Lindsey*, italicizing certain expressions contained in those two cases. We have heretofore discussed both of these cases and do not think it necessary to burden this brief with further discussion.

APPELLEE'S REPLY TO APPELLANTS' POINT IV

Under this point the Attorney General contends that the characterization of Chapter 176, laws of 1933, by the Supreme Court of New Mexico is not binding upon the Supreme Court of the United States, making the contention that the question involved in the case at bar is one of deprivation of rights secured by the Federal Constitution. The majority of the three-judge Court held that the New Mexico statute means what the New Mexico Supreme Court says it means. In other words, a tax upon the use of gasoline, and not a toll, rent or charge exacted as compensation for the use of the highways.

In support of his contention the Attorney General cites *American Manufacturing Co. v. St. Louis*, 250 U. S. 459, together with a list of cases following the holding in this case.

It is our contention that the Attorney General has failed to distinguish the two lines of cases. Without entering into a lengthy discussion, we take the position that the character of the tax, viz: as to whether it is an excise tax upon the use of gasoline, or, on the other hand, a toll, rent or charge exacted as compensation for use of state facilities, is a matter for the state to determine, and that not only has the state answered the question in the *Breece Lumber Co.* case and the *Transcontinental and Western Air, Inc.* case, but in addition to that, this Court has definitely construed the act in the two cases of *Askren v. Continental Oil Co.* and *Bowman v. Continental Oil Co.*, cited supra. In support of our contention, we cite the late case of *United States v. Kombst*, 286 U. S. 424. In that case the question was whether the California tax was a succession or an estate tax. The California courts, in several cases, having construed the California inheritance tax as laying a succession tax and not an estate tax, this Court held it was bound by the construction placed upon the act by the State Court. In the case at bar we contend that the character of the tax has been definitely determined, and that this Court is not now "free to construe this statute a priori" to the extent of determining the character of the tax. The character of the tax having been determined, the effect the tax

may have upon interstate commerce, and whether the tax deprives the party of rights secured by the Federal Constitution, is, of course, a matter to be determined in the Federal Court from the practical operation and effect of the act.

See also the case of "*Frost vs. Railroad Commission*" (California) 271 U. S. 583. In this case the California Supreme Court construed the California truck transportation act as permitting a private carrier to use the highways only on condition that he dedicate his property to the business of public transportation and subject himself to duties and burdens imposed on common carriers. This Court held that the construction the California Supreme Court placed upon the act was binding upon this Court, and that the act, as so construed, violated the due process clause under the Fourteenth Amendment.

The distinction in the various cases appears to be:— If the State Supreme Court construes the state statute as not depriving one of constitutional rights under the United States Constitution and the United States Supreme Court finds that, regardless of such construction, constitutional rights are abused, the decision of the State Supreme Court does not bind the United States Supreme Court. If, however, a State Supreme Court construes the statute so that, if it is applied in accordance with such construction, federal constitutional rights are abused, then the decision of the State Supreme Court is binding on the United States Supreme Court for final determination of whether or not, under such construction, federal constitutional rights have been invaded. We think this is the distinction.

See also *Crew Levick Co. v. Penn,* 245 U. S. 292.

At the legislative session in 1933, the New Mexico legislature completely codified and revised the gasoline and motor fuels excise tax laws. (Chapter 176, Session Laws of 1933—Appendix "G"). This codification and revision was made three years after the handing down by the Supreme Court of the State of New Mexico of the opinion in the case of "*Breece Lumber Co. vs. Mirabal,*" cited supra, which was handed down March 31, 1930. Under the familiar rule of construction, which does not need citation of authority, the legislature is presumed to know the construction placed

upon the legislation which it amends, codifies and revises. At the time it re-enacted, codified and revised the gas tax statute, the legislature was informed, through the Breece Lumber Co. case, that the original acts had been interpreted and applied by the Court as a mere excise tax, and that the Court had specifically declared that the tax levied was not levied as a rent, toll or compensation for the use of the state highways. The legislature, knowing this fact, still chose to leave the statute as it was, and in its re-enactment, revision and codification, did nothing to evidence any desire on the part of the legislature to make the statute one for compensation or otherwise different from the statute it was repealing, revising and amending, and which had been definitely construed by the Supreme Court of the State of New Mexico as being a pure excise tax, and not a rent, toll, or compensation for the use of the state highways.

In this same connection, in the case of *"Transcontinental and Western Air, Inc., v. Lujan,"* 36 N. M. 64, 8 P. (2nd) 103, the Supreme Court of New Mexico had specifically called to its attention the provisions of the original refund act, Chapter 31 of the Session Laws of 1931 (Appendix "H") and, while the Attorney General calls attention to the fact that the observations made by the Supreme Court of New Mexico upon the refund act are probably *dicta,* this case was also decided prior to the revision of the gas tax act (Chapter 176, Session Laws of 1933—Appendix "G"), and again the legislature is presumed to have been fully informed as to the interpretation of the gasoline tax acts and the refund act of 1931.

Notwithstanding this situation, the legislature did nothing to indicate that the gasoline tax act, as revised, amended, and codified in Chapter 176 of the Session Laws of 1933, was to be considered as a toll, rental, or compensation for the use of the state highways.

We, therefore, confidently submit that in the light of all of these facts, this Court cannot do otherwise than follow the construction placed upon the act by the Supreme Court of the State of New Mexico.

POINT V.

THE STATE OF NEW MEXICO IS WITHOUT POWER TO REQUIRE THE APPELLEE CORPORATION, ENGAGED EXCLUSIVELY IN INTERSTATE COMMERCE, TO BECOME A DISTRIBUTOR UNDER THE PROVISIONS OF CHAPTER 176 OF THE SESSION LAWS OF 1933 (Appendix "G").

As we have heretofore stated, this question was squarely presented to the three-judge Court under the pleadings and issues framed in this cause, but was not passed upon by the three-judge Court in its opinion, undoubtedly upon the theory that it was not necessary to a determination of the question in view of the holding of a majority of the Court upon the character and effect of the gasoline taxing provisions of Chapter 176 of the Session Laws of 1933.

It will be noted, at page 15 of the Transcript of Record, that the Gasoline Tax Department demanded that the appellee take out a license as a distributor of motor fuel under the provisions of the act and make reports as provided under the act. Turning to the act itself (Appendix "G") we find that in order to become a distributor it is necessary for the appellee, a foreign corporation, to be domesticated within the State of New Mexico, notwithstanding it does no intrastate business within the State of New Mexico. This requirement is clearly beyond the powers of the state.

Crutcher v. Kentucky, 141 U. S. 47, 51-63.
Western Union Tel. Co. v. Kansas, 216 U. S. 1, 27.
International Text Book Co. v. Pigg, 217 U. S. 91, 108-114
Sioux Remedy Co. v. Cope, 235 U. S. 197, 203-204
Bowman v. Continental Oil Co. 256 U. S. 642, 643-650

Under our propositions of law stated supra, we have called attention to the requirements of Chapter 176, Session Laws of 1933 (Appendix "G"), which the act imposes upon a licensed distributor. Without unduly lengthening this brief, in order to become a licensed distributor, the appellee would be required to qualify as a foreign corpora-

tion under the laws of the State of New Mexico, with all the incidental burdens and obligations of such qualification. In addition to that, the appellee would be required to make application for a distributor's license, pay the fee therefor submit reports, keep books and records as required by the act, submit its records to examination and inspection, and generally to be subject to the penalties of the act, notwithstanding the fact that the appellee does no intrastate business.

POINT VI.

SUMMARY OF APPELLEE'S POINTS

We may summarize the contentions of the appellee as follows:—

First:—The New Mexico gasoline tax is not the same kind of a tax as was held constitutional in the toll, rental, telephone pole, canal lock, and similar cases.

Second:—The tax is an excise tax levied on an instrumentality of interstate commerce (*Helson v. Kentucky,* cited supra).

Third:—That whether or not the tax is levied for compensation, the same is invalid as against the appellee engaged solely in interstate commerce.

Fourth:—That the tax is not for compensation as construed by the Supreme Court of the State of New Mexico, and the construction placed upon the gasoline tax act by the Supreme Court of the State of New Mexico is binding upon this Court.

Fifth:—That neither the State Court nor this Count (if this Court can construe the act) could construe the New Mexico gasoline tax acts, and particularly the use tax, as a rental, toll, or compensation for the use of the state highways, in the light of the legislative history of the acts, the New Mexico constitutional provisions requiring the purpose and intent of an act to be clearly set out in its title, or because of the purposes to which the proceeds of the use tax are devoted.

Sixth:—The attempted requirement under the provisions of Chapter 176 of the Session Laws of 1933 that the

appellee qualify under the corporation laws of New Mexico and become a distributor, is unconstitutional and void as imposing a burden on interstate commerce.

CONCLUSION

We, therefore, submit that the decree of the three-judge Court, enjoining appellants from enforcing the statutes in question as against the operations of the appellee, is right as a matter of law, and that the case should be affirmed.

Respectfully submitted,

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APPENDIX "A"

Chapter 93, Session Laws of 1919

AN ACT PROVIDING FOR AN EXCISE TAX UPON THE SALE OR USE OF GASOLINE AND FOR A LICENSE TAX TO BE PAID BY DISTRIBUTORS AND RETAIL DEALERS THEREIN; PROVIDING FOR COLLECTION AND APPLICATION OF SUCH TAXES; PROVIDING FOR THE INSPECTION OF GASOLINE AND MAKING IT UNLAWFUL TO SELL GASOLINE BELOW A CERTAIN GRADE WITHOUT NOTIFYING PURCHASER THEREOF; PROVIDING PENALTIES FOR VIOLATIONS OF THIS ACT AND FOR OTHER PURPOSES.

(This act was in effect from March 17, 1919 until repealed by Chapter 175, New Mexico Session Laws of 1921.)

* * * * *

Sec. 2. LICENSE TAXES. Every distributor of gasoline shall pay an annual license tax of fifty dollars for each distributing station or place of business or agency.

* * * * *

It shall be unlawful for any person to distribute or sell gasoline after July 1st, 1919, without having paid the said license tax and without having at all times conspicuously displayed at his place of business or agency a license certificate evidencing the payment of such license tax for the then current year or fraction thereof.

Sec. 3. There is hereby imposed an excise tax upon the sale or use of all gasoline sold or used in this State after July 1st, 1919, which tax shall be paid as hereinafter provided at the rate of two cents per gallon upon all gasoline sold or used.

* * * * *

Sec. 5. It shall be unlawful for any person (except tourists or travelers to the extent hereinafter provided) to use any gasoline not purchased from a licensed distributor of gasoline or retail dealer in gasoline in this State without paying the tax at the rate of two cents per gallon upon the use thereof.

* * * * *

It shall be unlawful for any person to knowingly use any gasoline without the said excise tax upon the sale or use thereof having been paid or provided for according to this Act; Provided, that any tourist or traveler coming into the state in a motor vehicle may bring into the State in such vehicle and for his own use only not more than twenty gallons of gasoline at one time and use the same with out payment of tax thereon.

Sec. 9. The State Treasurer shall set aside from the license fees and the taxes collected under the provisions of this Act a sufficient sum each year to pay the salaries and traveling expenses of the inspectors as herein provided, which salaries and expenses shall be paid in the manner provided by law for payment of salaries and expenses of other State officers and employes; the balance of the moneys so received from such collections shall be placed to the credit of the State Road Fund to be used for construction, improvement and maintenance of public highways.

APPENDIX "B"

Chapter 175, Session Laws of 1921.

AN ACT TO RETROACTIVELY AND PROSPECTIVELY LEVY AN EXCISE TAX ON GASOLINE; PROVIDE FOR THE DISTRIBUTION OF THE PROCEEDS THEREOF AND TO REPEAL CERTAIN LAWS.

(This act was in force from April 12, 1921 until amended by Chapter 61 of the Session Laws of 1925, March 17, 1925.

Sec. 3. There is hereby levied and imposed an excise tax of two cents per gallon upon the sale of all gasoline sold in this State from March 17, 1919, to and including the date of the taking effect of this act and an excise tax of one cent per gallon upon the sale of gasoline sold in this state thereafter, excepting in both cases, however, such gasoline as is or has been brought into this state and sold in original pack-

ages as purely interstate commerce sales or purchased outside the State and brought into this State in original packages by the consumer for his own use.

Sec. 5 * * * * *

The proceeds of such tax shall be paid into the State Treasury and covered into the State Road Fund, with the exception of fifteen thousand dollars thereof, which shall be covered into the State Fish Hatchery Fund out of collections made during the eleventh fiscal year and said fifteen thousand dollars shall be available during said fiscal year for the construction of State Fish Hatcheries under the direction and control of the State Game Commission, the moneys so covered into the State Fish Hatchery Fund shall be disbursed by warrant drawn by the State Auditor supported by certified and itemized vouchers of the State Game Commission.

APPENDIX "C"

Chapter 61, Session Laws of 1925.

AN ACT TO AMEND SECTIONS 3 and 5, CHAPTER 175, LAWS OF 1921, LEVYING AN EXCISE TAX ON GASOLINE AND PROVIDING FOR THE DISTRIBUTION OF THE PROCEEDS THEREOF.

(This act remained in effect until amended by Chapter 20, New Mexico Session Laws of 1927, approved March 4, 1927.)

Sec. 1. That Section 3, Chapter 175, Laws of 1921, be and the same is hereby amended to read as follows:

"Sec. 3. There is hereby levied and imposed an excise tax of three cents per gallon upon the sale of all gasoline sold in this State, excepting in all cases, however, such gasoline as is or has been brought into this State and sold in original packages as purely interstate commerce sales, or purchased outside the State and

brought into this State in original packages by the consumer for his own use."

Sec. 2. That Section 5, Chapter 175, Laws of 1921, be and the same is hereby amended to read as follows:—

"Sec. 5. * * * * * The proceeds of such tax shall be paid into the State Treasury and covered into the state road fund, the same to be budgeted and used by the State Highway Commission for the maintenance of state highways."

APPENDIX "D"

Chapter 20, Session Laws of 1927.

AN ACT TO AMEND SECTIONS 3 AND 5 OF CHAPTER 175, LAWS OF 1925, PROVIDING FOR AN EXCISE TAX ON GASOLINE AND THE USE OF PROCEEDS THEREOF FOR MAINTENANCE, CONSTRUCTION AND IMPROVEMENT OF PUBLIC HIGHWAYS AND TO MEET THE PROVISIONS OF THE FEDERAL AID ROAD LAW, AND AUTHORIZING THE ISSUE AND SALE OF DEBENTURES.

(Approved March 4, 1927.)

Sec. 1. That Section 3 of Chapter 175, Laws of 1921, as amended by Chapter 61, Laws of 1925, be and the same is hereby amended to read as follows:

"Sec. 3. There is hereby levied and imposed an excise tax of five cents per gallon upon the sale of all gasoline sold in this state, except gasoline sold in original packages or containers as purely inter-state commerce sales."

(This section was compiled as Section 60-203, New Mexico Statutes Annotated, Compilation of 1929, and is one of the effective statutes in this case.)

Sec. 2. That Section 5 of Chapter 175, Laws of 1921, as amended by Chapter 61, Laws of 1925, be and the same is hereby amended to read as follows:—

"Sec. 5. * * * * *

"The proceeds of said tax, except such portion thereof as may be necessary to pay the principal and interest of debentures issued hereunder, shall be paid into the state treasury and covered into the State Road Fund to be used for maintenance, construction and improvement of state highways and to meet the provisions of the Federal Aid Road Law."

(Section 2 of the Act was compiled as Section 60-205, New Mexico Statutes Annotated, Codification of 1929.)

APPENDIX "E"

Chapter 14, Session Laws of 1927.

AN ACT PROVIDING FOR AN EXCISE TAX UPON THE USE OF GASOLINE AND MOTOR FUEL.

(This Act was approved March 4, 1927, and remained in effect until amended by Chapter 29 of the Session Laws of 1929, approved March 7, 1929.)

Section 1. There is hereby levied and imposed an excise tax of five cents per gallon upon the use of all gasoline and motor fuel used in this State for propelling or operating motor busses, commercial cars, trucks, or other vehicles, upon public highways in New Mexico; provided, that in the collection of such tax a deduction shall be allowed of the excise tax paid in this State by distributors and dealers upon the sale of the gasoline and motor fuel so used.

APPENDIX "F"

Chapter 29 of the Session Laws of 1929.

AN ACT TO AMEND SECTION 1 OF CHAPTER 14, LAWS OF 1927, PROVIDING FOR AN EXCISE TAX UPON THE USE OF GASOLINE.

(This Act was approved March 7, 1929, being compiled in the New Mexico Statutes Annotated, Codification of 1929, as Section 60-101, and is one of the effective sections in this case.)

Section 1. That Section 1 of Chapter 14 of the Laws of 1927 be and the same is hereby amended to read as follows:

"Section 1. There is hereby levied and imposed an excise tax of five cents per gallon upon the use of all gasoline and motor fuel used in state *for any purpose;* provided that in the collection of such tax a deduction shall be allowed of the amount of the excise tax paid in this state by distributors or dealers upon the sale of gasoline so used."

APPENDIX "G"

Chapter 176, Session Laws of 1933.

AN ACT TO CODIFY AND REVISE THE GASOLINE AND MOTOR FUELS EXCISE TAX LAWS; TO DEFINE GASOLINE AND MOTOR FUELS AND OTHER TERMS; TO LEVY AN EXCISE TAX OF FIVE CENTS (5c) PER GALLON; TO PROVIDE FOR THE LICENSING OF ALL DISTRIBUTORS AND RETAIL DEALERS AND BONDING OF DISTRIBUTORS; TO PROVIDE FOR REPORTS FROM DISTRIBUTORS, RETAIL DEALERS, CARRIERS, AND OTHERS; TO PROVIDE FOR DEDUCTIONS FOR SALE TO FEDERAL OFFICERS; TO GIVE THE STATE COMPTROLLER POWER TO CAN-

CEL LICENSES AND BONDS; TO ESTABLISH THE TAX AS A LIEN ON PROPERTY; TO PROVIDE FOR PENALTIES AND PROCEDURE FOR COLLECTION OF TAX; TO REQUIRE DISTRIBUTORS, RETAIL DEALERS AND OTHER PERSONS TO PRESERVE RECORDS; TO PROVIDE FOR EXCHANGE OF INFORMATION AMONG THE STATES AND UNITED STATES; TO GIVE THE STATE COMPTROLLER AUTHORITY TO TEST MOTOR VEHICLE FUEL AND TO APPOINT AGENTS AND OFFICERS; TO PROHIBIT DELIVERY OF MOTOR FUEL FROM TANK TRUCKS TO MOTOR FUEL TANKS; TO PROVIDE PROCEDURE FOR COLLECTION OF TAX UPON DISCONTINUANCE OR TRANSFER OF BUSINESS OF DISTRIBUTOR OR RETAIL DEALER; TO CONTINUE EXISTING LIABILITIES FOR TAXES, PENALTIES AND INTEREST; TO REPEAL THE FOLLOWING ARTICLES AND SECTIONS OF THE NEW MEXICO STATUTES ANNOTATED, 1929 COMPILATION: ALL OF ARTICLE 1, SECTION 60, OTHERWISE CITED AS SECTIONS 60-101, 60-102, 60-103, 60-104 and 60-105; ALSO SECTIONS 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12 and 13 of ARTICLE 2, CHAPTER 60, OTHERWISE CITED AS SECTIONS 60-201, 60-202, 60-203, 60-204, 60-206, 60-207, 60-208, 60-209, 60-210, 60-211, 60-212 and 60-213; AND ANY LAWS IN CONFLICT THEREWITH.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Sec. 1. *Definitions.* • • • • •

(c) "Distributor" shall mean and include any person (including the State of New Mexico and any political subdivision thereof, but not including the United States of America or any of its agencies except to the extent now or hereafter permitted by the constitution and laws thereof)

(1) Making the first sale or other disposition in the State of New Mexico of any motor fuel, imported into the said State from any other state, territory or foreign country, after the same shall have been received within said state within the meaning of this Act;

(2) Consuming or using in the State of New Mexico any motor fuel so imported, who shall have purchased or otherwise acquired the same before it shall have been received by any other person in this state within the meaning of this Act;

(3) Producing, refining, preparing, distilling, manufacturing, blending or compounding motor fuel in the State of New Mexico;

(4) Engaged in the business of selling or delivering gasoline or motor fuel in this state from refineries, tank farms, tank cars, receiving tanks, bulk stations, or tank wagons in wholesale quantities, not coming within the definition of "distributor" as above given.

* * * * *

Sec. 2. *Five Cents (5c) Per Gallon Excise Tax.* There is hereby levied and imposed an excise tax of five cents (5c) per gallon upon the sale and use of all gasoline and motor fuel except gasoline sold in interstate commerce, *Provided*, that this tax shall be collected only once upon any particular motor fuel, and where the excise tax has been paid in this state by distributors or dealers upon the sale a like tax shall not be collected for the use of the same motor fuel; *Provided, however,* that nothing in this Act shall prohibit any incorporated municipality from assessing and collecting the tax provided for in Chapter 159 of the 1931 Session Laws.

Sec. 3. *Application for Licenses; Contents; Licensing of Distributors.* It shall be unlawful for any distributor to import, receive, use, sell or distribute any motor fuel or for any retail dealer to engage in business within this state as such, unless such distributor or retail dealer is the holder of an uncancelled license issued by the State Comptroller to engage in such business. To procure such license, every distributor or retail dealer shall file with the State

Comptroller an application upon oath, and in such form as said Comptroller may prescribe, setting forth:

(a) The name under which the distributor or dealer will transact business within this state;

(b) The location, with street number address, of its principal office or place of business within this state;

(c) The name and complete residence address of the owner, or the names and addresses of the partners, if such applicant is a partnership, or the names and addresses of the principal officers, if such application is a corporation or association; and if such applicant is a corporation or association, organized under the laws of another state, territory or county, it shall also file with such application a certified copy of the certificate of license issued by the New Mexico Corporation, Commission showing that such corporation or association is authorized to transact business in this state.

Upon the filing of an application for a license, and concurrently therewith, a bond or bonds of the character stipulated and in the amount provided for in Section 4 shall be filed with the State Comptroller. No license shall issue upon any application to any distributor unless accompanied by such a bond or bonds.

* * * * *

Upon the filing of the application for a license as distributor, a license fee of twenty-five dollars ($25.00) shall be paid to the Comptroller for each distribution station or place of business or agency; upon the filing of the application for a license as a retail dealer, a license fee of five dollars ($5.00) shall be paid to the Comptroller for each place of business or agency. Such license fee shall be payable annually on or before the first day of December for the following calendar year.

* * * * *

Sec. 4. *Bond required of Licensed Distributor.* Every distributor shall file with the State Comptroller a bond or bonds, on a form to be approved by said Comptroller, and

with a surety company authorized by the New Mexico Corporation Commission to transact business in this state as surety thereon and upon which such distributor shall be the principal obligor and the State of New Mexico shall be the obligee, conditioned upon the prompt filing of true reports and the payment by such distributor to said Comptroller of any and all motor vehicle fuel taxes which are now or hereafter may be levied or imposed by this state, together with any and all penalties and/or interest thereon and all fines which may be levied for any violations of this Act, and generally upon faithful compliance with the provisions of this Act.

* * * * *

Sec. 9. *Report from Persons Not Distributors; Penalty for Failure to Submit Report.* Every person purchasing or otherwise acquiring motor fuel otherwise than from a licensed distributor or retail dealer under the provisions of this Act, and using the same within the State of New Mexico, shall, on or before the twenty-fifth (25th) day of the month next succeeding the month in which such motor fuel was acquired or purchased, make a verified report to the State Comptroller, on forms prescribed and furnished by him, showing the amount of motor fuel so acquired or purchased, from whom such motor fuel was purchased or otherwise acquired, the point of shipment, to whom shipped, the point of delivery, the date of shipment, the name of the carrier over which the same was shipped, the initials and numbers of any railroad car containing such shipment and the number of gallons contained in said shipment, together with an affidavit showing the use to which such motor fuel is to be put or has been put, and such other additional information as the State Comptroller may require relative to such motor fuel.

Sec. 13. *Distribution of Tax and Licenses.* The excise tax of five cents (5c) per gallon on motor fuel and gasoline as herein levied and provided for shall be distributed as now or hereafter provided by law.

Sec. 23. *Failure to File Statement; False Statement; Doing Business Without License, etc.: Penalties.* Any per-

son who shall refuse or neglect to make any statement, report or return required by the provisions of this Act, or who shall knowingly make, or shall aid or assist any other person in making a false statement in a report to the State Comptroller, or who shall engage in business in this state as a distributor or retail dealer without being the holder of an uncancelled license to engage in such business, or who shall sell any motor vehicle fuel upon which the tax herein imposed shall not be paid, or shall violate any of the provisions of this Act, shall, upon conviction thereof, be punished by a fine of not less than five hundred dollars ($500.00) nor more than one thousand dollars ($1,000.00) or imprisonment in the county jail for a term of not less than thirty (30) days, nor more than one (1) year, or both such fine and imprisonment. Each day or part thereof, during which any person shall engage in business as a distributor or retail dealer without being the holder of an uncancelled license, shall constitute a separate offense within the meaning of this section.

Sec. 26. *Repealing Clause.* (Repeals sections noted in title.)

APPENDIX "H"

Chapter 31 of the Session Laws of 1931.

AN ACT TO PROVIDE FOR REFUNDING THE EXCISE TAXES PAID ON GASOLINE OR MOTOR FUEL PURCHASED AND USED BY CONSUMER OTHER THAN IN MOTOR VEHICLES OPERATED OR INTENDED TO BE OPERATED ON ANY OF THE PUBLIC STREETS OR HIGHWAYS OF THE STATE OF NEW MEXICO; PROVIDING FOR THE KEEPING OF RECORDS IN CONNECTION THEREWITH, THE EXAMINATION THEREOF AND PENALTIES FOR THE VIOLATION OF ANY OF THE TERMS OF THIS ACT, AND FOR THE REVOCATION OF LICENSES FOR VIOLATIONS THEREOF: AND CREATING A SPECIAL SUSPENSE FUND TO CARRY OUT THE PROVISIONS OF THIS ACT.

(The foregoing Act was approved March 11, 1931, and remained in effect until amended by Chapter 162 of the Session Laws of 1933, March 15, 1933.)

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. That every person, firm, partnership, corporation or association having paid for any one purchase, the excise tax to a distributor or wholesaler upon fifty-six (56) or more gallons of gasoline or motor fuel, which gasoline or motor fuel was purchased and used solely and exclusively by such person, firm, partnership, corporation or association other than in motor vehicles operated or intended to be operated upon any of the public streets or highways in the State of New Mexico, shall be entitled to a refund equal to the amount of tax so paid, upon compliance with the provisions of this act, and not otherwise.

Sec. 2. Every person, firm, partnership, corporation or association desiring to take advantage of the provisions of this act shall at the time of purchase and payment of tax, obtain a receipt for each and every purchase of gasoline or motor fuel from the wholesale dealer or distributor thereof, which receipt shall contain the name of the seller, his address, the name of the purchaser, his address, occupation, the quantity and grade of gasoline or motor fuel purchased, the amount of tax paid, the uses to which the purchaser intends to put such gasoline or motor fuel, the make, horsepower, and other mechanical description of machinery in which the same is to be used, and such other information as may be deemed necessary by the State Comptroller, and such receipt shall be signed in triplicate, two copies of which shall be carbon, by the seller and the purchaser or his or its duly authorized agent or agents. The forms of receipts shall be furnished by the State Comptroller, upon request, to wholesale dealers or distributors entitled thereto, and shall be printed in colors, the original to be retained by the seller or distributor as herein provided shall be green in color and the duplicate and triplicate may be of any other colors so as to make the same easily dis-

tinguishable. After the due execution of said receipts as herein provided, the seller shall return the duplicate to the purchaser and shall deliver the original green copy within thirty days to the State Comptroller.

Sec. 3. Upon the payment of the tax thereon, and at any time within four months after the date of the first purchase of any portion of the gasoline or motor fuel constituting any portion of the 200 gallons for which refund may be claimed under the provisions of this act, the purchaser may file an affidavit to be attached to the receipt returned to him, as provided in Section 2 of this act, which affidavit shall be sworn to under oath by the claimant before an officer authorized to administer oaths and shall state the quantity of such motor fuel so purchased and used by said claimant other than in motor vehicles operated or intended to be operated upon any of the public streets or highways of the State of New Mexico, with the State Comptroller requesting therein a refund of the tax paid; Provided, applications shall in no event be considered or allowed upon a total quantity of less than two hundred gallons of gasoline or motor fuel. For the purpose of carrying out the provisions of this act, the receipt, when attached to said affidavit, shall become a part thereof and shall be interpreted as such and have that effect. The said State Comptroller, upon presentation of said affidavits and receipts duly executed, shall cause to be refunded to said claimant consumer, from the gasoline or motor fuel taxes collected, an amount equal to the gasoline or motor fuel taxes paid by said claimant consumer on the gasoline or motor fuel so purchased and used. No application filed after the four months' period prescribed in this section shall be considered for any purpose by the State Comptroller or the Treasurer of the State of New Mexico.

Sec. 4. The State Comptroller, for the purpose of making the refunds provided in this act, is hereby authorized to create a special suspense fund with the Treasurer of the State of New Mexico, in sufficient amount to pay all legal claims made in conformity with the provisions of this act, from the funds derived from the excise tax on gasoline and

motor fuel as and when available. At the expiration of six months after the taking effect of this Act, the State Comptroller shall estimate the amount of funds necessary to make the refunds authorized herein, and shall keep an amount available at all times to meet the requirements of the provisions of this act. Any surplus fund over and above the estimated amount in such special suspense fund shall forthwith be turned into the highways funds of the State of New Mexico, to be distributed as provided by law.

Sec. 5. It shall be the duty of every wholesale dealer or distributor of gasoline or motor fuel in the State of New Mexico to keep a full and complete record of each and every receipt given to purchasers of gasoline or motor fuel, as authorized by the provisions of this act, and to deliver to the State Comptroller the green copy within thirty days, as in this act required. The State Comptroller, his deputy or any other person authorized by said Comptroller, shall make examinations of the records of sellers or distributors, as he may deem necessary in carrying out the provisions of this act. The costs of such examinations shall be borne by the state.

Sec. 6. Any wholesale dealer or distributor of gasoline or motor fuel in the State of New Mexico, failing or refusing to comply with the provisions of this act, shall be subject to revocation of his or its license to sell or distribute gasoline or motor fuel within the state and the State Comptroller is hereby given the power to enforce the provisions of this act.

Sec. 7. A person, firm, partnership, corporation, association or any officer or agent thereof, acting either as seller or purchaser, or in their behalf, who wilfully gives, signs or executes a false receipt or aids in the falsifying of a receipt, as provided for in this act, or who wilfully fails to keep a full and complete record as in this act provided, shall be guilty of a felony and shall be punished by a fine of not less than five hundred ($500.00) dollars nor more than one thousand ($1,000.00) dollars or by imprisonment

in the state penitentiary for not less than one nor more than two years, or by both such fine and imprisonment.

Sec. 8. Any person or any officer or agent of a corporation who wilfully files a false claim or aids in the filing of a false claim with the Comptroller of the State of New Mexico, or wilfully makes a false statement or conceals any material fact in any record, report, affidavit, receipt or claim provided for in this act, or knowingly uses any gasoline or motor fuel on which refunds have been applied for, in the operation of a motor vehicle on the public streets or highways of this state, shall be guilty of a felony and shall be dealt with and punished for such offense in the same manner as provided under Section 7.

APPENDIX "I"

Chapter 129 of the Session Laws of 1919.

AN ACT RELATING TO THE SUPERVISION AND REGULATION OF THE BUSINESS OF OPERATING MOTOR VEHICLES AS COMMON CARRIERS UPON THE PUBLIC HIGHWAYS AND PRESCRIBING THE COMPENSATION TO BE PAID FOR THE USE OF SUCH HIGHWAYS IN CARRYING ON SUCH BUSINESS.

(Approved March 12, 1929, and in effect until June 12, 1933, when amended and repealed by Chapter 154, Session Laws of 1933.)

Sec. 7. In addition to the regular license fees and taxes imposed upon motor vehicles, there shall be paid by and collected from every motor vehicle carrier except those specifically excluded from the provisions of this Act, the following charges as compensation for the use of the public highways and the maintenance, repair and reconstruction of the same:

(This section then prescribes the rates for different classes and kinds of service.)

Sec. 9. All monies collected by the Corporation Commission under the terms of this Act shall be remitted by said Commission to the State Treasurer of the State of New Mexico.

The said treasurer shall cover twelve and one-half per cent of such monies when received into a special fund to be known as the "State Corporation Commission Motor Vehicle Fund."

The monies in said State Corporation Commission Motor Vehicle Fund shall be used to defray the expenses of the performance by said Corporation Commission of the duties imposed on it under the provisions of this act, and shall be paid out for that purpose upon warrants executed by the State Auditor pursuant to vouchers drawn against said fund by said Corporation Commission; *Provided, however*, that any surplus remaining in said fund at the end of any fiscal year shall be transferred into and credited to the State Road Fund.

APPENDIX "J".

Chapter 154, Session Laws of 1933.

AN ACT RELATING TO THE SUPERVISION AND REGULATION OF THE BUSINESS OF THE TRANSPORTATION BY MOTOR VEHICLES FOR HIRE OVER THE PUBLIC HIGHWAYS OF THE STATE OF NEW MEXICO; PRESCRIBING THE COMPENSATION FOR THE USE OF SUCH HIGHWAYS AND CARRYING ON SUCH BUSINESS; AND REPEALING SUCH PARTS OF CHAPTER 129, LAWS OF NEW MEXICO OF 1929, CHAPTER 52, LAWS OF NEW MEXICO OF 1931, AND ALL OTHER LAWS OF THE STATE OF NEW MEXICO AS ARE IN CONFLICT HEREWITH.

(Approved March 15, 1933, effective June 12, 1933.)

Sec. 39. In addition to the regular license fees and taxes imposed upon motor vehicles, there shall be assessed against and collected from every such carrier for the ad-

ministration of this Act and for the maintenance, repair and reconstruction of the public highways a mileage tax which shall be computed as follows:—

(Remainder of this section prescribes the fees for different classes of service.)

Sec. 44. All monies collected by the Corporation Commission under the terms of this Act shall be remitted by said Commission to the State Treasurer of the State of New Mexico. The said Treasurer shall cover fifty per cent of such moneys when received into a special fund to be known as the "State Corporation Commission Motor Transportation Fund"; *Provided,* that the total expenditures by the Commission from this fund shall not exceed $25,000.00 per annum. And be it further provided that any and all expenditures from said fund shall first be approved by the State Board of Finance.

The money in said State Corporation Commission Motor Transportation Fund shall be used to defray the expenses of the performance by said Corporation Commission of the duties imposed on it under the provisions of this Act, and shall be paid out for that purpose upon warrants executed by the State Auditor pursuant to vouchers drawn against said fund by said Corporation Commission; *Provided, however,* that any surplus remaining in said fund at the end of any fiscal year shall be transferred into and credited to the State Road Fund.